reasonable expectation that his occupation is not to be disturbed. Their Lordships also stressed that nothing was done to limit the use of the jetty in point of duration and held that in consequence Plimmer had acquired an indefinite, that is practically a perpetual right to the jetty for the purpose of the original licence and if the ground was afterwards wanted for public purpose it could only be taken from him by the legislature.

On the other hand, in the instant case, it was provided in the contract that the tenant could only construct a wooden shed on the land and the shed they had in mind and subsequently built on the land was built of corrugated iron roof, wooden posts and wire mesh walls. If there was anything at all suggesting the duration of the tenancy, the very nature of the construction would indicate a tenancy of a temporary nature, and I am therefore unable to agree with the learned judge's conclusion that there had arisen in the tenant's favour an equity or equitable estoppel protecting his occupation of the land.

I would therefore allow the appeal and make an order in terms of the plaintiff's claim. The defendant must vacate the land within one month from the date of this judgment and he will pay the plaintiff's costs here and in the courts below. The plaintiff/appellant's deposit of $500 to be returned to him.

Suffian and **Ong Hock Sim F.JJ.** concurred.

Appeal allowed.

Solicitors: *Jayadeva & Zahir; Lim Huck Aik & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE

v. E.D.C.

[A.C.J. (Gill F.J.) April 10, 1973]

[Kuala Lumpur — Originating Motion No. 19 of 1972]

Income Tax — Double taxation — Person resident in Malaysia — Income derived from and subject to tax in Singapore — Tax for the year of assessment 1969 — Whether Singapore income liable to Malaysian tax — Double Taxation Agreements — Double Taxation Relief (Republic of Singapore) Order, 1966 — Repealed law — Double Taxation Relief (Singapore) Order, 1968 — Income Tax Act, 1967.

The question in this case was whether the respondent's income derived from Singapore in 1968 was liable to income tax for the year of assessment 1969. The Double Taxation Agreement 1966 between Malaysia and Singapore was effective until December 31, 1968 but it was no longer valid law in Malaysia as from January 1, 1968 by reason of the repeal of the Double Taxation Relief (Republic of Singapore) Order 1966 which had given it the force of law. The 1968 Double Taxation Agreement between Malaysia and Singapore came into force with effect from the year of assessment 1969. The Director-General of Inland Revenue, Malaysia took the view that the respondent was liable to Malaysian income tax for the year of assessment 1969 but on appeal the Special Commissioners decided that the respondent was exempt from Malaysian tax under the provisions of the Double Taxation Agreement of 1966. The Director-General of Inland Revenue appealed to the High Court.

Held: the exemption granted by the 1966 Order continued to be operative in the year 1968 as though such order was made under section 127 of the Income Tax Act, 1967 or under any other corresponding section. The 1966 Agreement also remained in force during the year 1968, even though the order giving it the force of law had been repealed. The exemption under the 1966 Agreement having been kept alive by the transitional and saving provisions contained in Schedule 9 to the Income Tax Act, 1967, until December 31, 1968, the respondent had acquired a benefit under the 1966 Agreement which by virtue of paragraph 2(b) of Article XXI of the 1968 Agreement was not affected, notwithstanding the provision in paragraph 1(a) of the same Article of the Agreement that it shall have effect as respects Malaysian tax for the year of assessment 1969.

CASE STATED.

Mohamad Nizar bin Idris (Federal Counsel) and *Rahmat bin Haji Jamari* (Federal Counsel) for the appellant.

J. Puthucheary for the respondent.

Gill F.J.: This is an appeal by way of case stated by the Special Commissioners of Income Tax under paragraph 34 of Schedule 5 to the Income Tax Act, 1967 at the instance of the Director-General of Inland Revenue.

The facts of the case as admitted or proved are simple. The respondent is a partner of Cooper Brothers & Co., a firm of chartered accountants practising in Malaysia, Singapore and Brunei. He also has shares in two companies resident in Singapore. In 1968 the respondent received from Singapore a sum of $49,408 as his share from the partnership and a sum of $2,090 being gross dividends from his shares in the two companies.

The respondent's income derived from Singapore was subject to tax in Singapore in accordance with the income tax laws of Singapore. The Comptroller of Income Tax, Singapore therefore took it into account in assessing the respondent's income tax for the year of assessment 1969.

As the financial year of the partnership ended on 31st May each year, the period 1st June, 1967 to 31st May, 1968 was the basis period for the year of assessment in relation to the respondent's share of the income from the partnership, under section 21(2) of the Income Tax Act, 1967. In relation to the gross dividends from his shares in the two companies the basis year for the year of assessment 1969, under section 20 of the Act, was the calendar year 1968.

The respondent was ordinarily resident in Malaysia during the basis year for the year of assessment in 1969 to which I have just referred.

The question for determination in this appeal is whether the respondent's said income received from Singapore is liable to Malaysian income tax. The Director-General of Inland Revenue, Malaysia answered that question in the affirmative and proceeded to levy tax accordingly. On appeal, the Special Commissioners of Income Tax decided that such income was exempt from Malaysian tax under the relevant exemption provisions of the agreement dated 16th August, 1966 (hereinafter referred to as the 1966 Agreement) which the Governments of Malaysia and the Republic of Singapore had entered into with a view to afford relief from double taxation in relation to Malaysian tax and Singapore tax.

From that decision the Director-General of Inland Revenue has now appealed to this court.

It is common ground that the answer to this appeal hinges on the effect of the 1966 Agreement and another agreement dated 26th December, 1968 (hereinafter referred to as the 1968 Agreement) between the two Governments for the avoidance of double taxation.

The relevant provisions of the 1966 Agreement are as follows: —

"The profits of a Malaysian enterprise shall not be taxable in Singapore unless the enterprise carries on business in Singapore through a permanent establishment situated in Singapore. If the enterprise carries on business as aforesaid, tax may be imposed in Singapore on the profits of the enterprise but only on so much of them as is attributable to that permanent establishment. No further tax shall be imposed in Malaysia in respect of profits of the permanent establishment which are remitted to Malaysia. [Article IV, paragraph 1(a)].

Dividends paid by a company which is a resident of one of the Contracting States shall be charged to tax by the respective Contracting States to the extent to which the dividend represents a distribution of profits derived from sources in those Contracting States. No further liability shall be imposed on the shareholder by reference to liability on an income received basis. (Article VII, paragraph 2).

Where a resident of one Contracting State derives income from sources within the other Contracting State and that income in accordance with the income tax laws of each Contracting State and the provisions of this Agreement is subject to tax in the other Contracting State, the former Contracting State shall exempt such income from tax. (Article XVII, paragraph 2)".

The 1966 Agreement was incorporated as a Schedule to the Double Taxation Relief (Republic of Singapore) Order, 1966 (P.U.385 of 1966) which was made under section 45 of the Income Tax Ordinance, 1947.

It would seem clear that under the 1966 Agreement, so long as it remained in force, the respondent's income which he received from Singapore was exempt from Malaysian tax. But the Double Taxation Relief (Republic of Singapore) Order, 1966, which gave the 1966 Agreement the force of law, was repealed by section 155(2) of the Income Tax Act, 1967 with effect from 1st January, 1968, the Income Tax Ordinance, 1947 itself having been repealed by section 155(1) of the Act. Paragraph 33 of Schedule 9 to the Act, however, provides as follows: —

"Any exemption from any previous tax or from any provision of a repealed law shall, if it was made under a repealed law and was effective on 31st December, 1967, be deemed to have been made by an order under section 127 in relation to tax imposed by this Act or in relation to the corresponding provision of this Act, as the case may be:".

There is a provision in the 1966 Agreement itself for its termination. This is to be found in Article XXI, paragraph 2 which reads as follows: —

"This Agreement shall continue in effect indefinitely, but either of the Contracting States may, on or before the 30th day of June in any calendar year give to the other Contracting State notice of termination, and in such event, this Agreement shall cease to be effective after the last day of the calendar year in which the notice is given".

Notice of termination in the following terms was given by the Malaysian Government on 25th June, 1968:

"Notice is hereby given to terminate the Agreement so that it will cease to be effective from the year of assessment commencing from January 1969".

The 1968 Agreement between the two Governments was incorporated as a Schedule to the Double Taxation Relief (Singapore) Order, 1968 which was made under section 132 of the Income Tax Act, 1967. Article XXI of the 1968 Agreement provides as follows: —

"1. This Agreement shall come into force on the date when the last of all such things shall be done in Malaysia and Singapore as are necessary to give the Agreement the force of law in Malaysia and Singapore, and shall thereupon have the effect as respects —

(a) Malaysian tax for the year of assessment 1969 and subsequent years of assessment;

(b) Singapore tax for the year of assessment 1969 and subsequent years of assessment.

2. Nothing in this Agreement shall affect:

(a) anything duly done or suffered to be done; or

(b) any right, privilege, benefit, obligation or liability acquired, accrued or incurred,

under the provision of the Agreement between the Government of Malaysia and the Government of the Republic of Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed on the sixteenth day of August 1966 (hereinafter referred to as the 1966 Agreement)."

The reasons which the Special Commissioners have given for their decision may be summarised as follows. The 1966 Agreement between the Governments of Malaysia and Singapore remained effective until 31st December, 1968, but it was no longer valid law in Malaysia as from 1st January, 1968 by reason of the repeal of the Double Taxation Relief (Republic of Singapore) Order, 1966 which had given it the force of law. The Double Taxation Relief (Republic of Singapore) Order, 1966 was made under a "repealed law" as defined in paragraph 1(i) of Schedule 9 to the Income Tax Act, 1967, so that, until otherwise provided by law, the saving provision in paragraph 33 of Schedule 9 to the Act preserved the exemption clauses in the 1966 Agreement beyond 1st January, 1968. Paragraph 2 of Article XXI of the 1968 Agreement, which was given the force of law by the Double Taxation Relief (Singapore) Order, 1968 made under section 132 of the 1967 Act, also preserved the rights and benefits accrued to the taxpayer in the 1966 Agreement in respect of his income derived from Singapore in 1968, notwithstanding the fact that the 1968 Agreement came into force with effect from the year of assessment 1969.

The Special Commissioner's decision is summed up in their finding that by virtue of paragraph 33 of Schedule 9 of the Income Tax Act, 1967 and paragraph 2 of Article XXI of the 1968 Agreement, the respondent is entitled to exemption from Malaysian income tax in accordance with the exemption clauses in Articles IV, VII and XVII of the 1966 Agreement and under section 127 of the Income Tax Act, 1967.

The general ground of appeal against the Special Commissioner's decision is that they wrongly interpreted the two Double Taxation Agreements between the Governments of Malaysia and Singapore by their misapplication of the ordinary rules of construction. The dispute in the appeal, it is said, arises with regard to the meaning to be given to the words "calendar year" appearing in Article XXI (2) of the 1966 Agreement, and it is submitted that this meaning can only be gathered by looking at the Agreement as a whole and in the context of the income tax legislation.

The words "calender year" are not defined in the 1966 Agreement itself, nor are they defned in the Income Tax Ordinance, 1947 or the Income Tax Act, 1967, but it is argued that in view of their use in relation to the words "basis period" and the words "year of assessment", which are defined in the 1947 Ordinance, they have acquired a definite meaning in the tax law. This argument proceeds in this way. "Basis period" for any year of assessment means the period on the profits of which tax for that year falls to be assessed. "Year of assessment" means a period of twelve months commencing on such day as the appropriate authority may, by notification in the *Gazette*, appoint, and each subsequent period of twelve months. This period of twelve months was first fixed by a *Gazette* Notification to run from 1st January, 1948 to 31st December, 1948. The 1967 Act defines the words "year of assessment" as calendar year, subject to subsection (5) of section 2, so that when we read Article XXI (2) of the 1966 Agreement the words "calendar year" therein should be read as meaning the "year of assessment".

The argument then proceeds as follows. Looking at the 1947 Ordinance, the words "calendar year" can never mean the basis period or the basis year, because these terms may vary in length of time due to the commencement or cessation provision of the Ordinance. Since the words "calendar year" are to be substituted for the words "year of assessment", the 1966 Agreement would cease to be effective in the year of assessment 1968, so that by virtue of the notice of termination given by the Malaysian Government the respondent's income could never be covered by the 1966 Agreement. Paragraph (1) of Article XXI of the 1966 Agreement states that the Agreement shall have effect in both Contracting States in any year of assessment beginning on or after 1st January, 1966, the key words being the words "year of assessment". Although the drafters have used the words "calendar year" in paragraph (2) of Article XXI, paragraphs (1) and (2) of the Article should be read together to give it its full meaning. Since the drafters used the words "year of assessment" in paragraph (1), it was also their intention that the words "calendar year" in paragraph (2) should have the same meaning. Thus, in the context of Article XXI as a whole the words "calendar year" should be read to mean the year of assessment.

In support of the same argument further submissions are made to this effect. It is important to establish the exact date when the 1966 Agreement ceased to be effective and the exact date when the 1968 Agreement came into force. In other words, Article XXI (2) of the 1966 Agreement and Article XXI of the 1968 Agreement must be read together. In construing a statute or an agreement it must be assumed that the drafters knew the existing state of the law. Article XXI of the 1968 Agreement states that it shall come into force for the year of assessment 1969, for which the basis year is the year 1968. Article XXI (2) of the 1966 Agreement therefore must be read to mean that the Agreement shall cease to be effective from the year of assessment 1968, so that there is no gap between the two Agreements and there is no period of no agreement. Bearing in mind that the 1947 Ordinance, which gave the 1966 Agreement the force of law, ceased to be effective from 1st January, 1968, and having regard to the state of law existing at the time when the 1966 Agreement ceased to be effective, it is only logical to interpret that the drafters of the Agreement intended that the words "calendar year" appearing in Article XXI (2) of the 1966 Agreement should be read to mean the year of assessment. In the circumstances, it will be illogical to give the words "calendar year" their popular and ordinary meaning.

It is conceded that if the 1966 Agreement applies only up to and including the year of assessment 1967 and the 1968 Agreement applies as from the year of assessment 1969, then there would be a period of no agreement as regards the year of assessment 1968. But it is argued that it was in respect of this period of no agreement that paragraph 2 of Article XXI of the 1968 Agreement made a provision as regards any right, privilege, benefit, obligation or liability acquired, accrued or incurred under the 1966 Agreement. It is further argued that if it was intended to mean that the 1966 Agreement shall continue to apply for the year of assessment 1969, then the drafters of the 1968 Agreement would have provided that it shall come into force as from the year of assessment 1970 instead of 1969. The respondent's income earned in the year of assessment 1969 is therefore not covered by Article XXI (2) of the 1968 Double Taxation Agreement between the two countries.

Having given the arguments put forward on behalf of the appellant a full and careful consideration, I must say that I can find very little substance in them. It is to be observed that the words "calendar year" in Article XXI (2) of the 1966 Agreement are used with reference to the notice to be given for the termination of the Agreement. The notice was required to be given on or before the 30th day of June in any calendar year. It would seem clear to me that the words "any calendar year" here cannot mean anything other than the period of twelve months beginning with the first day of January in any year, which is the popular and ordinary meaning of those words. Once the notice as stipulated was given, the agreement ceased to be effective after the last day of the calendar year. Here again, the words "calendar year" must be given their popular and ordinary meaning. They merely deal with the period during which the notice had to be given.

That brings me to the question as to whether the Special Commissioners are right in deciding that the respondent's profits which he received from Singapore in 1968 are exempt from Malaysian income tax by virtue of paragraph 33 of Schedule 9 to the Income Tax Act, 1967 and paragraph 2 of Article XXI of the 1968 Agreement.

In my judgment the Special Commissioners' decision is correct for the reasons which they have stated. The Income Tax Act, 1967 which came into force on 1st January, 1968 repealed with effect from the same date the Income Tax Ordinance, 1947 and all subsidiary legislations made thereunder. The Double Taxation Relief (Republic of Singapore) Order, 1966 therefore stood repealed as from 1st January, 1968. The exemption under the 1966 Order, being an exemption made under a repealed law, however, was effective on 31st

December, 1967. Under the transitional and saving provision contained in paragraph 33 of Schedule 9 to the Income Tax Act, 1967 this exemption must be deemed to have been made by an order under section 127 or any corresponding provision of the 1967 Act. In other words, the exemption granted by the 1966 Order continued to be operative in the year 1968 as though such order was made under section 127 of the 1967 Act or under any other corresponding section, such as section 132. The 1966 Agreement also remained in force during the year 1968, even though the order giving it the force of law had been repealed. Simultaneously with the termination of the 1966 Agreement as from 1st January, 1969, there came into force the Double Taxation Relief (Singapore) Order, 1968 which was made under section 132 of the Income Tax Act, 1967. The exemption under the 1966 Agreement having been kept alive by the transitional and saving provision contained in Schedule 9 to the 1967 Act until 31st December, 1968, the respondent had acquired a benefit under the 1966 Agreement which by virtue of paragraph 2(b) of Article XXI of the 1968 Agreement was not affected, notwithstanding the provision in paragraph 1(a) of the same Article of the said Agreement that it shall have effect as respects Malaysian tax for the year of assessment 1969.

I would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitor: *Skrine & Co.*

TANG CHOK CHING v. WONG IK TIENG & ORS.

[F.C. (Ismail Khan C.J. (Borneo), Gill F.J. and Pawan Ahmad J.) April 11, 1973]

[Kuching — Federal Court Civil Appeal No. 42 of 1972]

Practice and Procedure — Judgment in default of appearance — Application to set aside judgment — Proof of irregularity or prima facie defence on merits — Action by firm against one of its partners — Execution of judgment — Leave of court necessary — R.S.C., 1957, O. 13 r. 10 and O. 48A r. 10.

In this case the respondents suing as a firm had claimed payment of a debt due by the appellant to the firm. It appeared that the appellant was one of the partners of the firm. The appellant having failed to enter appearance, judgment in default was entered against him. The appellant subsequently applied to have the judgment set aside and a prohibitory order issued pursuant to that judgment rescinded. The application was dismissed in the High Court and the appellant appealed.

Held: (1) as the appellant had not shown that the judgment obtained was irregular or that he had a *prima facie* defence on the merits, his application to set aside the judgment was rightly dismissed;

(2) although a firm could bring an action against one or more of its members, where judgment was obtained by the firm against one or more of its partners, no execution could be issued without leave of the court or a judge;

(3) as there was no evidence in this case that the prohibitory order was issued with the leave of the court, it could not stand and the application to set aside the prohibitory order and all subsequent proceedings must therefore be allowed.

Case referred to:-

(1) *Chinese Rehabilitation Loans Board* v. *Chee Hoi Woon* [1959] M.L.J. 152.

FEDERAL COURT.

Joseph Tang for the appellant.

Leong Ee Ong for the respondents.

Gill F.J.: This is an appeal from an order of the High Court at Kuching dismissing the application by the appellant, as defendant in the action, that the judgment entered against him in default of appearance be set aside and he be granted leave to defend the action, that the prohibitory order issued pursuant to that judgment be rescinded and that the summons for directions issued in the course of such execution proceedings be stayed.

The action was commenced by the respondents, suing under the firm name of Lian Seng Timber Contractor Company, by a specially endorsed writ issued on June 5, 1971. The plaintiffs' claim was for the sum of $39,225.26 being a debt which the plaintiffs' books showed the defendant to be justly owing to the plaintiffs. A statement of account in Mandarin and a translation thereof in English were exhibited to the statement of claim which was specially endorsed on the writ. The defendant having failed to enter an appearance after the writ was duly served on him, judgment for the amount claimed was entered against him on July 7, 1971.

The application to set aside the judgment was made by summons-in-chambers on August 30, 1971. In his affidavit in support of the application, the defendant stated that on receipt of the writ he promptly wrote to the Registrar of the High Court at Kuching a letter dated June 25, 1971 and headed Statement Of Defence denying the plaintiffs' claim of $39,225.26. He further stated that the Registrar advised him to file the defence after he had entered an appearance and to deliver a copy of it to the solicitors for the plaintiffs, but that due to his belief that he had already delivered his defence as contained in his letter of June 25, 1971 and owing to his complete ignorance of the law and procedure he omitted to enter an appearance or to file a defence. In his supplementary affidavit sworn to on November 30, 1971 he stated that he together with the members of his family and friends had half of the total shares in Lian Seng Timber Contractor Company and in a company known as Batang Ai Logging Sendirian Berhad, that Batang Ai Logging Sendirian Berhad and Lian Seng Timber Contractor Company shared the same manager and treasurer, and that since the accounts of both companies had never been properly audited from the time the plaintiffs took over the management in March, 1970, the account on which he was sued was grossly inaccurate and indeed wrong.

In dealing with the defendant's application the learned judge took the view that the gist of the affidavits in support of the application was a mere denial of the debt which, under the rules relating to pleadings, was insufficient, and that there was no substance in the other matters raised by the defendant. In the event he dismissed the application with costs.